

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

In Re: Pork Antitrust  
Litigation

File No. 18CV1776  
(JRT/HB)

Minneapolis, Minnesota  
January 28, 2019  
10:05 A.M.

BEFORE THE HONORABLE CHIEF JUDGE JOHN R. TUNHEIM  
UNITED STATES DISTRICT COURT JUDGE  
**(MOTIONS HEARING)**

APPEARANCES

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10:05 A.M.

(In open court.)

THE COURT: You may be seated. Good morning.  
Civil Case Number 18-1776, Wanda Duryea, et al, versus Agri  
Stats, Inc., et al.

Let's have counsel note appearances, first those  
who are here today for the plaintiffs.

MS. SCARLETT: Shana Scarlett from Hagens Berman  
appearing for the Consumer Indirect Purchaser Plaintiffs.

THE COURT: All right. Good morning.

MR. BRUCKNER: Good morning, Your Honor. Joe  
Bruckner from Lockridge Grindal Nauen here for the Direct  
Purchaser Plaintiffs.

THE COURT: Good morning, Mr. Bruckner.

MR. GUSTAFSON: Good morning, Your Honor. Dan  
Gustafson for the Consumer Plaintiffs.

THE COURT: Mr. Gustafson.

MR. SIMON: Good morning, Your Honor. Bruce  
Simon, Pearson Simon Warshaw, co-lead counsel with  
Mr. Bruckner's office in the case.

THE COURT: Good morning.

MR. POUYA: Good morning, Your Honor. Bobby  
Pouya of Pearson, Simon & Warshaw for the Direct Purchaser  
Plaintiffs.

1 MS. WEINER: Good morning, Your Honor. Melissa  
2 Weiner, Pearson, Simon & Warshaw, for the Direct Purchaser  
3 Plaintiffs as well.

4 THE COURT: Good morning to you.

5 MR. RAITER: Good morning. Shawn Raiter, Larson  
6 King, on behalf of the commercial indirects.

7 THE COURT: All right.

8 MR. HEDLUND: Good morning, Your Honor. Dan  
9 Hedlund, Gustafson Gluek, for the Consumer Indirect  
10 Purchaser Plaintiffs.

11 THE COURT: Good morning.

12 MR. CIALKOWSKI: Good morning, Your Honor. Dave  
13 Cialkowski with Zimmerman Reed for the commercial  
14 indirects.

15 MR. CLARK: Brian Clark, Lockridge Grindal Nauen,  
16 on behalf of the Direct Purchaser Plaintiffs.

17 THE COURT: All right. For the defendants who  
18 are here in the courtroom?

19 MR. NEUWIRTH: Good morning, Your Honor. Stephen  
20 Neuwirth from Quinn Emanuel for defendant JBS.

21 THE COURT: Good morning.

22 MR. HEEMAN: Good morning, Your Honor. Don  
23 Heeman, Spencer Fane, for defendant JBS.

24 MR. PARKER: Good morning, Your Honor. Richard  
25 Parker, Gibson Dunn, for Smithfield Foods.

1 MS. MILLER: Good morning, Your Honor. Britt  
2 Miller, Mayer Brown, on behalf of Indiana Packers and  
3 Mitsubishi Corporation of America.

4 THE COURT: Good morning.

5 MR. RASHID: Good morning, Your Honor. Sami  
6 Rashid from Quinn Emanuel for defendant JBS.

7 THE COURT: Good morning to you.

8 MS. STILSON: Good morning, Your Honor. Jaime  
9 Stilson from Dorsey & Whitney also here for Indiana Packers  
10 and Mitsubishi Corporation of America.

11 THE COURT: Good morning.

12 MR. DUNCAN: Good morning, Your Honor. Richard  
13 Duncan, Faegre Baker Daniels, for the Hormel defendants.

14 THE COURT: Good morning.

15 MR. ROBISON: Good morning, Your Honor. Brian  
16 Robison for Smithfield.

17 THE COURT: Good morning.

18 MS. ADCOX: Rachel Adcox from Axinn Veltrop &  
19 Harkrider for the Tyson defendants.

20 MS. COTTRELL: Good morning. Christa Cottrell,  
21 Kirkland & Ellis, for Clemens Food Group.

22 MR. STALLINGS: And William Stallings also  
23 for Indiana Packers and Mitsubishi Corporation of America.

24 THE COURT: All right. Good morning to all of  
25 you. Now, we have some counsel on the telephone; is that

1 correct? Let's identify whoever is on the phone.

2 MR. PEARSON: This is Michael Pearson from  
3 Pearson, Simon & Warshaw on behalf of the Direct Purchaser  
4 Plaintiffs.

5 THE COURT: Okay. Anybody else?

6 MR. CUNEO: Jonathan Cuneo, Cuneo, Gilbert &  
7 LaDuca, on behalf of the Commercial Indirect, with  
8 Mr. Raiter.

9 THE COURT: All right. Anyone else?

10 MS. SCHEIDERER: Megan Scheiderer from Husch  
11 Blackwell for the defendant Triumph Foods.

12 THE COURT: All right. And do we have one more  
13 on the phone?

14 MS. NELSON: Good morning. Jessica Nelson,  
15 Spencer Fane, for JBS defendants.

16 THE COURT: All right. The Court has read the  
17 briefs that have been filed in this case. We have motions  
18 to dismiss this morning. Who is going to begin?

19 MR. NEUWIRTH: Good morning, Your Honor. If it  
20 would please the Court, Stephen Neuwirth for the defendants  
21 from Quinn Emanuel. I am going to be addressing the  
22 sufficiency of the federal claims.

23 THE COURT: Okay.

24 MR. NEUWIRTH: Mr. Parker from Gibson Dunn is  
25 going to be addressing the statute of limitations

1 arguments, and Ms. Miller from Mayer Brown on behalf of the  
2 defendants is going to be addressing the individual  
3 defendant motions that were filed.

4 THE COURT: All right.

5 MR. NEUWIRTH: And also if it would please the  
6 Court, for the argument on the sufficiency of the claims, I  
7 put together a binder that has all materials that were in  
8 the briefs just to facilitate the argument, and if I could  
9 approach, I have copies for Your Honor and your clerks.

10 THE COURT: That's fine.

11 MR. NEUWIRTH: And we will also give it to the  
12 plaintiffs.

13 THE COURT: All right. Mr. Neuwirth.

14 MR. NEUWIRTH: Thank you very much, Your Honor.  
15 Your Honor, the defendants respectfully submit that this is  
16 the rare case that compels dismissal because it does not  
17 come close to meeting even the minimal standards of  
18 sufficiency and plausibility set forth by the Supreme Court  
19 in *Twombly* and by the Eighth Circuit and courts in this  
20 district since the *Twombly* decision.

21 And this perhaps should not be surprising because  
22 this case was brought mainly by the same lawyers who are  
23 prosecuting a case in federal court in Illinois related to  
24 the broiler chicken industry, and it was only after that  
25 *Broiler Chicken* case survived a motion to dismiss that this



1 case was filed here attempting to make similar allegations  
2 related to the pork industry.

3 And the defendants respectfully submit that the  
4 square peg of the *Broiler* case simply does not fit into the  
5 round hole of the pork industry, and if we look behind tab  
6 1 in the binder, *Twombly* and its progeny are particularly  
7 relevant in an antitrust case like this one, and in fact,  
8 as the Eighth Circuit noted in the *Insulate* case, the  
9 courts have been reasonably aggressive in weeding out  
10 meritless antitrust claims at the pleading stage given the  
11 unusually high cost of discovery, the likelihood of  
12 discovery abuse and the threat that discovery expense will  
13 push cost conscious defendants to settle even an anemic  
14 case.

15 This is something that the Court and this circuit  
16 has recognized as well. As we note behind tab 2 the key  
17 issue at this stage is plausibility. Have -- does the  
18 complaint make allegations that push the case from  
19 something that is merely possible across the line of  
20 plausibility, and this is something that the Eighth Circuit  
21 has noted in the *Insulate* case.

22 And it's noted as well that mere labels and  
23 conclusions and conclusory allegations simply are not  
24 sufficient to get across the plausibility line, and as the  
25 *Cascades* case that we cite at the bottom of tab 2 notes,

1 When a conspiracy makes no economic sense, the claim must  
2 be dismissed.

3 Now in antitrust conspiracy cases like this one,  
4 the question is, Was there an agreement, and if we look  
5 behind tab 11, we see that the Eighth Circuit has noted in  
6 the *Pre-Filled Propane Tank* case that in an antitrust case,  
7 the plaintiffs must plead factual content by listing  
8 relevant individuals, acts and conversations to support the  
9 reasonable inference that the defendant is liable for the  
10 alleged conspiracy, and of course the hallmark of a  
11 conspiracy is agreement.

12 So the question is in this case, Do the  
13 complaints plausibly allege that there was an agreement  
14 here? Now, what is it that is alleged? As we see behind  
15 tab 12, the core allegation here is that the defendants had  
16 an agreement to limit the supply of hogs used to make pork.

17 Pork, as we know, comes from hogs, and the  
18 complaints allege repeatedly as we note at the top of tab  
19 12 that the defendants agreed upon a scheme to limit hog  
20 supply, that they had ongoing adherence to agreed upon  
21 plans for coordinated production limits and that they  
22 implemented their conspiracy by coordinating output and  
23 limiting production.

24 The problem is that these conclusory assertions  
25 are not backed up by any specific allegations. The

1 complaint tells us nothing about what supply reductions and  
2 coordinated production limits for hogs were agreed upon or  
3 when. It tells us nothing about which defendants  
4 supposedly implemented those limits or when, and it tells  
5 us nothing about the duration of this agreement, and this  
6 case is nothing like the *Pre-Filled Propane Tank* case in  
7 the Eighth Circuit from 2017 where there were a lot of  
8 details about who spoke to whom, when the conversations  
9 took place and what was agreed.

10 This is also nothing like the *Broiler* case that  
11 the plaintiffs invoke. That case had many details about  
12 who in the industry was reducing supply, what was being  
13 done to reduce supply and when. The Court wrote a lengthy  
14 opinion talking about all of those details. None of that,  
15 Your Honor, is present here.

16 And in fact, the law is very clear, as we see  
17 behind tab 4, that just making general assertions, group  
18 pleading against the defendants, is absolutely inadequate  
19 to establish plausibility because as the Supreme Court  
20 said, This gives us no clue about what defendant did what,  
21 and as this Court noted in 2012, A complaint that just  
22 lumps all the defendants together fails to state a claim  
23 for relief.

24 And similarly in the *Milk Products* case in this  
25 district, the Court said that you have to dismiss the case

1 when the defendants were simply lumped together. Those  
2 allegations we looked at, Your Honor, simply lumped the  
3 defendants together. They don't have any specific details,  
4 and we know from the *Erie County* case in the Sixth Circuit  
5 that just making aggregated assertions about what happens  
6 does not give rise to an inference of an unlawful  
7 agreement.

8 It's just descriptions of what happened in the  
9 market, not allegations of anything that the defendants  
10 did, and this is particularly true as we see behind tab 5  
11 for parent companies. There are four parent companies at  
12 least that are identified in the complaint here: The  
13 Clemens Family Corporation, Mitsubishi Corporation, JBS USA  
14 Food Holdings Company and Seaboard Corporation.

15 None of these companies are alleged to have done  
16 anything other than be parents of other defendants, and  
17 clearly the courts have repeatedly said that throwing  
18 companies like that into a group pleading is also  
19 insufficient.

20 This is also a case as we see behind tab 6 where  
21 there is just no parallel conduct alleged. There were  
22 repeated conclusory assertions that the defendants were  
23 trying to reduce supply. Nowhere in the complaint can you  
24 find a single allegation of what the defendants did  
25 together to cause this to happen.

1           This is not like the *Broiler* case where there are  
2           specific statements or meetings that the District Court  
3           showed some connection to acts that the specific defendants  
4           took to reduce supply. None of that is here. The District  
5           Court in the *Broiler* case went out of its way to detail  
6           those connections that it felt were in the complaint.

7           None of that is here in this case, and so perhaps  
8           it's not surprising that the plaintiffs have now in their  
9           opposition to this motion invoked the so-called slight  
10          evidence rule where they say, well, it's enough to just  
11          barely talk about any facts about the defendants, but as we  
12          see behind tab 7 in the *Lithium Ion Batteries* case from  
13          2014, the Court noted that the slight evidence rule has  
14          been disapproved as a standard for determining whether a  
15          defendant has joined a conspiracy in the first instance and  
16          indeed is a standard applicable in district courts at all.

17          The plaintiffs were forced to cite a 1991 case as  
18          their support for using this so-called slight evidence  
19          rule, but that rule has since been rejected, and the Eighth  
20          Circuit as well in the *United States versus Lopez* case  
21          rejected that standard there in a criminal case.

22          Now, in addition to the problem of failing to  
23          plead any factual details, there is another significant  
24          problem with this case, Your Honor. The conspiracy that is  
25          alleged is simply implausible on its face, and just like in

1       *Twombly*, it's implausible based on what is in the complaint  
2       itself.

3               As we see behind tab 13, this was supposed to be  
4       a conspiracy that caused supply to be reduced, and if we  
5       look, there is a chart in the complaint at paragraph 107,  
6       figure 3. It's also in the CIP complaint figure 4, this  
7       exact same chart, and what it shows is that during the  
8       conspiracy period supply went up, and there were  
9       significant increases in a number of years during that  
10      period.

11             Now, if we turn to tab 14, the way that the  
12      plaintiffs have tried to respond to that in opposition to  
13      this motion is to make the remarkable argument that there  
14      is some trajectory line they can draw which somehow shows  
15      that production didn't really go up. Now, they say in  
16      their opposition brief at page 31 that to determine the  
17      trajectory of production in the absence of collusion, the  
18      line properly should be drawn through the pre-conspiracy  
19      data points.

20             Well, that's not what they do. If we look on the  
21      left here at the bottom, they don't draw a line through the  
22      pre-conspiracy data points. They draw a line just through  
23      two of them, and the line they draw suggests that even in  
24      the pre-conspiracy period, production was below the trend  
25      that they say is the trend that should have been in place.

1           The chart that they draw is simply implausible,  
2           and the way we know that is by looking behind tab 36  
3           because in the *Broiler* case, they presented a similar chart  
4           to support the claims, most of the plaintiff attorneys here  
5           submitted a similar chart, and look what the judge did in  
6           the *Broiler* case.

7           He looked at a trend line in the opinion that did  
8           exactly what we are doing here, what the defendants are  
9           doing. He drew a line through all of the points in the  
10          preperiod, and then he showed that after the conspiracy  
11          started, the production numbers were below that trend line.  
12          He drew it through all the points, not just through a low  
13          point and a high point.

14          But if we turn back to tab 14, that's not what  
15          the plaintiffs do at all, but it's the defendants who do  
16          that, as we see on the right. And if you do what the  
17          plaintiffs say should be done, which is to draw a line  
18          through the pre-conspiracy data points and then you look at  
19          where that line goes, it shows that in fact the trend of  
20          growth and production did not change at all. This is all  
21          in the complaint. This is not a plausible conspiracy to  
22          reduce supply as an absolute amount or even to reduce the  
23          rate of supply growth.

24          But there is another reason, Your Honor, why this  
25          conspiracy isn't plausible on its face, and that we see

1 behind tab 15. As we noted, the core claim here is that  
2 there was a conspiracy to reduce the supply of hogs used to  
3 make pork. That is the core claim in this case, and that's  
4 why the complaints say over and over again that the  
5 vertical integration of the defendants is critical.

6 What does that mean? It means that the  
7 defendants were not just producing pork, but they were also  
8 raising the hogs that are used to make pork, and in the  
9 *Broiler* case, that was a central finding by the District  
10 Court there.

11 The Court there said that it understood from the  
12 complaint that the defendants there controlled the supply  
13 of broilers, I think the Court said, from the eggs to the  
14 chickens to the broilers. The problem, and look what the  
15 defendants say -- look what the plaintiffs say.

16 They say that the vertical integration of the  
17 defendants here allows the defendants to directly control  
18 the production and supply of pork through their  
19 wholly-owned and operated farms where the hogs are raised,  
20 fed and prepared for slaughter, and the IIP plaintiffs  
21 expressly say in their complaint that it was this vertical  
22 integration that allowed the scheme to proceed.

23 The problem is, there are eight pork producers in  
24 this case, and the plaintiffs in their complaints only  
25 allege that three of them are vertically integrated. So



1 this is a conspiracy purportedly to control the supply of  
2 hogs involving companies that don't even control the supply  
3 of hogs, and in fact, the complaint at paragraph 83 makes  
4 express reference to the independent farmers from which  
5 defendants buy hogs.

6 There is no allegation here that the defendants  
7 or the three of them that are even alleged to have any hog  
8 supply of their own control enough of the hog supply to  
9 make any impact on prices for pork, and if we turn  
10 behind tab -- I'm sorry, Your Honor.

11 THE COURT: Are you going to address Agri Stats?

12 MR. NEUWIRTH: Yes, Your Honor.

13 THE COURT: It seems to me there is a significant  
14 issue there with regard to essentially secret sharing of  
15 production data that, as I understand, it wasn't made  
16 public.

17 MR. NEUWIRTH: I can turn to that immediately.  
18 If it would please the Court, just one last very quick  
19 point on the vertical integration and the defendants not  
20 being hog producers. As we see behind tab 16, another  
21 reason the conspiracy isn't plausible is precisely because  
22 it would make no sense for companies that purchase hogs to  
23 conspire to reduce the supply of hogs and make the prices  
24 of hogs higher.

25 That is the number one input into the price of

1 pork, and it makes no economic sense. Common sense says  
2 that this conspiracy doesn't make sense, and as we see in  
3 the bottom of tab 16, again in their opposition brief the  
4 defendants say it's the decreased hog production that  
5 caused prices to go up.

6 So turning directly to Agri Stats, if we turn to  
7 tab 21, we see that what is actually alleged about Agri  
8 Stats in the complaints is that Agri Stats supposedly  
9 allowed each member of the cartel to police each other's  
10 production for signs of cheating.

11 And it's critical here, as the case law points  
12 out, simply using information as an enforcement mechanism,  
13 if that's what is alleged, is not a sufficient allegation  
14 to show that there was an underlying conspiracy. The fact  
15 that they alleged Agri Stats was being used to enforce the  
16 conspiracy tells us nothing about what the underlying  
17 agreement was. They still haven't pleaded the underlying  
18 agreement.

19 And certainly the courts have also recognized as  
20 the Supreme Court did in the *Gypsum* case and as the *Todd v.*  
21 *Exxon* case pointed out, exchanging data can increase  
22 sufficiency and doesn't in and of itself have  
23 anti-competitive effects. So to allege in the complaint,  
24 as they do, that this is just a way to enforce the  
25 conspiracy still begs the question of what is the agreement

1 that the defendants made that they are trying to enforce.

2 The fact that they say Agri Stats might allow  
3 people to know whether somebody is conforming to the  
4 conspiracy assumes something that hasn't been established,  
5 and that may be why the plaintiffs in their opposition have  
6 totally changed their theory about Agri Stats. As we see  
7 behind tab 23, the complaints, as I noted, repeatedly said  
8 that Agri Stats was an enforcement mechanism for the  
9 conspiracy.

10 That is what is actually alleged, but now in  
11 opposition, as we see on the right, the defendants are now  
12 arguing that the defendants -- the plaintiffs are now  
13 arguing that the defendants merely committed to the  
14 exchange of information through Agri Stats and that this  
15 alone is a plausible basis from which to infer an  
16 agreement.

17 So the new theory, which is not in the  
18 complaints, is that the mere exchange of information  
19 through Agri Stats was a vehicle for this conspiracy, and I  
20 think that was what Your Honor's question had been directed  
21 to. So first point, that's not in the complaints. What  
22 was alleged was that it was an enforcement mechanism.

23 As we see behind tab 24, the very case on which  
24 this new theory is premised, *Todd v. Exxon*, which is the  
25 case that plaintiffs cite to support their new exchange of

1 information theory, actually expressly says that  
2 allegations of exchanging information like we have here are  
3 insufficient.

4 The Court there expressly said, Exchange of  
5 information is not illegal per se and is analytically  
6 distinct from allegations that defendants actually formed  
7 an agreement to fix prices. So we're left now with a  
8 changed theory which says that the defendants were  
9 exchanging information with each other. That theory  
10 doesn't work as a matter of law.

11 And as we see behind tab 25, the other thing that  
12 the plaintiffs alleged in the complaint was that Agri Stats  
13 supposedly gave the defendants unparalleled ability to  
14 share critical and proprietary information and that Agri  
15 Stats was key to the formation, operation and continuing  
16 stability of the defendants' anti-competitive scheme and  
17 that it supposedly allowed the defendants to know that the  
18 supply of pork would not be increasing.

19 The problem with those allegations is, as we saw  
20 earlier, that's not what happened. The complaints  
21 themselves show that supply did not in fact go down. So  
22 now what do the plaintiffs do? What they argue now, as we  
23 see on the right side here, is that, yes, this information  
24 was exchanged but that fluctuations in aggregate production  
25 were not predicted with the clarity of a crystal ball.

1           So the theory now is that Agri Stats, even though  
2           the defendants didn't really reduce supply, it gave them  
3           information that allowed them to know something about what  
4           was happening in the market, and we would respectfully  
5           submit, Your Honor, that Agri Stats allegations just don't  
6           work.

7           They were sufficiently implausible in the  
8           complaint that the plaintiffs changed them in their  
9           opposition papers, and now what they allege in their  
10          opposition papers doesn't work as a matter of fact or as a  
11          matter of law.

12          Now, we would also very -- we think it's also  
13          critical that in a case like this one where there is no  
14          plausible explanation for what actually is alleged to have  
15          happened here, it is appropriate for the Court to consider  
16          the obvious alternative explanations for what happened, and  
17          as we see behind tab 17, courts have repeatedly recognized  
18          that common sense of the courts can be used to determine  
19          whether there are reasonable alternative explanations.

20          The plaintiffs have been left to argue now that  
21          there were three years within the alleged conspiracy period  
22          when, when supply decreased, 2009, 2010 and 2013, but as we  
23          see behind tab 18, the complaints themselves recognized  
24          that in 2009 and 2010, there was the major recession which  
25          the complaints recognize in the documents that they cite

1 had an impact on supply, and there were similarly record  
2 high corn prices and pig disease. This is all in the  
3 complaint for those two years, all in the complaint.

4 And as we see behind tab 19, in 2013 and '14, the  
5 other years when they say that supply supposedly went down,  
6 really 2013, there was both pig disease and higher corn  
7 prices that were alleged in the complaint and were said in  
8 the complaint to have affected supply. So we see supply is  
9 going up. The trend of supply is the same.

10 The plaintiffs say, oh, but within this long  
11 conspiracy period there were three years when supply  
12 dropped, but in each of those three years, the complaint  
13 itself provides an explanation for what was happening in  
14 the market, and if I could just briefly talk about the pig  
15 disease that was relevant to 2013.

16 The complaints expressly say, quote, that the  
17 PEDV virus in the spring and summer of 2014 caused a  
18 production dip that was reflected -- that reflected the  
19 adverse impacts from the deadly pig disease. So the  
20 complaint says, 2014, pig disease affected supply.

21 The problem is that the document that they cite,  
22 as we point out on page 19, actually says that this pig  
23 disease from the PED virus started early in 2013 and that  
24 pig supply had been affected since 2013. So within the  
25 complaint itself, the document that the complaint cites

1 gives the alternative explanation for why supply went down  
2 in 2013.

3 The plaintiffs don't point that out, but that's  
4 what the document actually says, and so all of the  
5 arguments that the plaintiffs make about 2014 actually  
6 apply to 2013, and that leaves us with nothing to justify  
7 this case going forward, and just very quickly, the  
8 plaintiffs argue that there was no increase -- the  
9 plaintiffs argue that export supposedly went up.

10 They probably did that because that was a factor  
11 in the *Broiler* case, but if we look behind tab 26, we see  
12 that again exports actually went up and that the biggest  
13 increases in exports took place before the conspiracy  
14 started and that there was only a small increase in exports  
15 after the conspiracy had begun and that in fact the  
16 complaint recognized that there was increased global demand  
17 for pork during the conspiracy period.

18 So once again, the complaint gives us, the  
19 complaint gives us the answer. As we see behind tab 21, to  
20 the extent that the plaintiffs -- I'm sorry -- behind tab  
21 20, to the extent that the plaintiffs are alleging that  
22 defendants purportedly refrained from increasing capacity,  
23 those types of allegations are clearly insufficient because  
24 the courts recognize that choosing not to increase capacity  
25 without more doesn't prove anything, but perhaps more

1 importantly here is that the three instances alleged by  
2 plaintiffs were not capacity reductions at all.

3 One involved a new joint venture that actually  
4 added capacity where the defendant just didn't add a second  
5 shift, and the others similarly were cases where capacity  
6 increased. There are also public statements that are here.  
7 I will just say briefly that all of the public statements  
8 that they cite are actually the type of statements that  
9 public companies have to make to investors about what is  
10 happening in the market. That case law is detailed in our  
11 papers.

12 And most importantly, unlike in the *Broiler* case,  
13 there is no connection drawn between any of these  
14 statements and any action that any particular defendant  
15 took to actually affect supply, and in the *Broiler* case,  
16 the Court drew connections that it felt existed in the  
17 complaints there between public statements that were made  
18 and actual actions to reduce supply.

19 There is nothing like that in this complaint,  
20 Your Honor, and similarly, the allegations about trade  
21 associations, concentration in the industry, earnings,  
22 pricing, all of that is addressed here, and we believe that  
23 at this point this case has nothing in it that would  
24 justify moving the case to the next phase.

25 We think it's critical to note, Your Honor, that



1 the plaintiffs in the face of all that the defendants were  
2 able to show about the insufficiency of the complaint made  
3 it a key part of their opposition to argue that it would be  
4 appropriate to let the case move on to discovery so that  
5 these facts could be further developed.

6 But as we know from the *Insulate* case, just the  
7 opposite is true. If the complaint is insufficient, moving  
8 on to discovery is the exact opposite of what federal  
9 courts are supposed to do in these types of antitrust  
10 cases, and finally, we would also submit that leave to  
11 amend here would be futile because the problems with the  
12 complaint here, Your Honor, are problems that can't be  
13 fixed by amendment.

14 The reasons that the complaint is implausible,  
15 the fact that the defendants are not producers of hogs in a  
16 case that is about reducing the supply of hogs, the fact  
17 that supply went up at a time when it was supposed to be  
18 supposedly going down and that the rate of supply continued  
19 throughout the period compared to what it had been before,  
20 those problems can't be fixed with an amendment.

21 And we would express -- we would suggest that  
22 this case is very much like *Magee v. Trustees of Hamline*  
23 *University* where Your Honor held that it would be  
24 inappropriate to have leave to amend precisely because the  
25 complaint couldn't be changed in a way that would make it

1 adequate, and that's all the more so here where we're  
2 dealing with an amended complaint, a consolidated amended  
3 complaint. This is not the first time that the case has  
4 been pleaded.

5 So we would like to reserve roughly five to ten  
6 minutes for rebuttal, but let me turn it over now to  
7 Mr. Parker to address the statute of limitations. Thank  
8 you.

9 THE COURT: All right. Very well. Thank you,  
10 Mr. Neuwirth.

11 Go ahead, Mr. Parker.

12 MR. PARKER: Thank you, Your Honor. Rich Parker.  
13 I'm one of the lawyers representing Smithfield, and I will  
14 be talking for all defendants on the statute of  
15 limitations.

16 Your Honor, what you see in the complaint and in  
17 the plaintiffs' papers is an effort to put together an  
18 argument that they have stated a claim under Section 1  
19 based on old facts, based on very, very old facts, what we  
20 call on our side of the room ancient history, and that  
21 means that there is an independent --

22 Now, I don't think for one second -- as  
23 Mr. Neuwirth said, they have not stated a claim, and that's  
24 our position, but let's assume they did. This case is  
25 timed out. This case should have happened five years ago,

1 and the argument we're now having with Mr. Neuwirth and the  
2 other side should have occurred five or six years ago, and  
3 let me take you through that.

4 What they're relying on is fraudulent  
5 concealment, and so I'm going to make two points: Number  
6 one, in 2009 to 2013, the facts were all there and publicly  
7 available. That means they were on due diligence to figure  
8 it out, and that means equally that we didn't fool them,  
9 hide anything, bamboozle them or anything else.

10 Now, the law under *Wood v. Carpenter* and some of  
11 the other cases, *Wholesale Groceries* and *Milk* decided in  
12 this courtroom are that where something happens in the  
13 marketplace that "excites interest" then you're on inquiry  
14 notice.

15 And what they say -- Your Honor, I'm so into this  
16 case I've memorized the chapters. This is the Maplevale  
17 complaint. Paragraph 131 says, Oh, my goodness, in 2009,  
18 there is dramatic drastic difference and change in pricing.  
19 We used to price this way, and all of a sudden, well, they  
20 are going up. It's drastic.

21 Then in paragraph 107, they say the same thing  
22 about production. We have always had increasing  
23 production. Looks like a ruler going up. All of a sudden  
24 it didn't go up anymore. That puts them on notice. These  
25 are great lawyers, and it sounds to me like they didn't get

1       these folks in until five years too late because had they  
2       done their due diligence at that time, and Your Honor, I  
3       have some, I have some binders I would like to show you  
4       quickly here.

5               MR. ROBISON: May I approach, Your Honor?

6               THE COURT: Yeah.

7               MR. PARKER: I'm going to use them briefly. If  
8       you would turn to page 3, I would most certainly appreciate  
9       it. Thank you.

10              Your Honor, what I'm saying is this: Is that if  
11      you started doing your due diligence in 2009, which they  
12      were supposed to do, they would go to the USDA. This is an  
13      industry which the government is all over. There is hot  
14      and cold running data in this industry. You can find  
15      production data. You can find hog data. You can find  
16      pricing data. It's all there.

17              And when you look at this complaint, what are  
18      they doing? They're looking at the publicly available data  
19      from when? From back in 2009, '10 and '11. It's all out  
20      there. You send a bright young person to the web, and they  
21      would discover the earnings calls, and I'm referring to  
22      paragraphs 110 to 130 of the Maplevale complaint. They say  
23      the earnings calls are overt acts.

24              We say this is just normal business from public  
25      companies responding to earnings calls. Let's assume

1 they're overt facts. I'll assume that. They are all out  
2 there. This complaint could have been written before 2014.  
3 Now, one other point, and I think this is critical. Agri  
4 Stats, Your Honor, is not the secretive organization it's  
5 made out to be.

6 If you look at paragraphs 44, start with  
7 paragraph 44 of this complaint, they have a strong  
8 description of Agri Stats. Based on what? Based on  
9 publicly available speeches of an Agri Stats executive  
10 named Mr. Bilbrey starting in 2008 and 2009, and I would  
11 refer you specifically to paragraph 51 of the Maplevale  
12 complaint, which takes you through an Agri Stats report.

13 It doesn't have numbers in there, but it says  
14 what the line items are, and what's the conclusion from a  
15 smart antitrust lawyer over here? Oh, my goodness. They  
16 are exchanging data. Now, I think that is okay. We defend  
17 that, but there is no doubt, no doubt, that before 2013 you  
18 would have had the production, you would have had the  
19 prices, and you would have had what Agri Stats was doing.  
20 That's why this should have happened.

21 Now, let's talk about fraudulent concealment.  
22 The fact, Your Honor, that all that stuff was out there  
23 sure shows on its face that we didn't cover anything up.  
24 We're sending information to the Department of Agriculture.  
25 We're doing our earnings calls. Agri Stats is making

1 speeches about what they do. Nothing is covered up.

2 The *Cantonis* case, which was decided in this  
3 courtroom, was where somebody was selling medical devices  
4 and was frauding the FDA and was covering up an FDA report  
5 that their product wasn't any good. When that came out,  
6 that's fraudulent concealment, and that put them on notice.  
7 That's fair. Where is the eureka moment here?

8 So I'm saying on the one hand, all the facts were  
9 out there, but what is it that they've learned since that  
10 time? And so turn if you would to page 5, and you will see  
11 they rely on two things, a Bloomberg article about  
12 chickens. Chickens are not hogs. We all know that.  
13 Chickens, that's what it's about.

14 The article, it is apparently sourced by the  
15 plaintiffs' lawyers sitting at this table who were involved  
16 in that case. So they were tipped off by their own  
17 article. I don't understand that, but I'm just making that  
18 point. The other thing is is this article is 99.95 percent  
19 about chickens, and all it says is that, guess what? Agri  
20 Stats is getting into the pork business. That's really --  
21 that's all it says. That's their tip-off.

22 We knew that. You go to page 44, paragraphs 44  
23 and the following of this complaint, we all knew all that.  
24 There was nothing to tip anybody off. Then they say they  
25 were tipped off by the Broiler's complaint, that is the

1 chicken case, and I don't see anything about pork in there,  
2 either. Your Honor, in the *Cantonis* case you're supposed  
3 on -- in the *Broiler* case they said the defendants were  
4 doing bad things and they covered it up, and it became  
5 uncovered, and that's when the statute started running.  
6 That's not what happened here.

7 THE COURT: What about the continuing violation  
8 allegation?

9 MR. PARKER: Your Honor, I'm moving right to  
10 that. So let's just set the stage real quick here. Okay.  
11 So what I'm saying is, they are timed out from '09 to '13.  
12 They start talking about stuff in '09. This case needed to  
13 be on file by the '13.

14 So now they're saying we can collect damages from  
15 '14 until yesterday afternoon because it's continuing, and  
16 so they say the conspiracy is continuing, but that's all  
17 they say. You've got to have some more facts than that,  
18 and so I want to turn to something that Steve -- excuse  
19 me -- Mr. Neuwirth was talking about that is very critical  
20 here.

21 Turn if you would to page 7 of my booklet here,  
22 and this is -- write down. I should have put this down.  
23 It's paragraph 107, my favorite paragraph from the  
24 Maplevale complaint, and look what it says. Here you go.  
25 Okay. And there is a reduction in '14, right? But we're

1 not tagged with that. That's when the pigs all got sick.

2 We're not tagged with that one.

3 Look where it is afterwards. So how can you sit  
4 there under *Twombly*, and that's a rhetorical question, Your  
5 Honor. I don't ask you questions. I'm making a point  
6 here. How can you sit there and say there is a continuing  
7 conspiracy when your own complaint says, I mean come on,  
8 production is going up, and I want to compare this to some  
9 very important Eighth Circuit opinion, and that's the  
10 *Propane* case.

11 And there the Eighth Circuit said, correctly in  
12 my humble opinion -- they can say anything they want, but  
13 I'm just saying correctly. They held that just pleading  
14 continuing conspiracy was okay in that case, but here's  
15 what was going on. The complaint was that these guys had  
16 canisters that were 17, some 17 volume. They were about  
17 this high, but they filled them up about that high and then  
18 they kept the price the same (indicating). It was cute.  
19 That's why the FTC enjoined it.

20 But the complaint says that guess what? The  
21 canister is still this high and it's only filled this high  
22 and the price is the same, therefore the conspiracy  
23 continued. Okay. Okay. Here they're saying the  
24 conspiracy continued, but their complaint shows production  
25 going up. Their complaint contradicts that point, unlike



1 the *Propane* case.

2 And then in their opposition they say, well, I've  
3 got to tell you something. Had it not been for the bad  
4 conduct by the people on this side of the room, it would  
5 have gone up more. Judge, there is nothing to support  
6 that. Nothing. And if there is going to be a statute of  
7 limitations in these kind of cases, we need -- you know,  
8 Justice Briar in the *Clear* case said that private  
9 enforcement is part of enforcement.

10 The antitrust laws in this country are enforced  
11 by the FTC, the DOJ, the states and by folks like this, but  
12 it is important that if they're going to be doing it, it  
13 needs to be done on a timely basis. That's why they  
14 strictly enforce the statute of limitations, to create an  
15 overwhelming incentive for people to get the work done on a  
16 timely basis, and, sir, that did not happen here.

17 And on the continuing violation, if somebody can  
18 just type, well, yeah, production is going up but the  
19 conspiracy continues and that's good enough, I suggest that  
20 we have undermined our statute of limitations.

21 THE COURT: The information, the production  
22 information provided through Agri Stats, how different was  
23 that than the public information provided, or is that not  
24 part of allegations or part of the record yet?

25 MR. PARKER: I don't believe that's part of the

1 record. My understanding is is that it overlaps, but there  
2 is additional things that are not public. I'm not saying  
3 that everything in an Agri Stats report is publicly  
4 available.

5 THE COURT: All right.

6 MR. PARKER: That's what I am saying. I really  
7 think we have, we really have them here. I mean, this case  
8 has timed out, and to simply say there is a continuing  
9 violation just frankly doesn't cut it, to use the  
10 colloquial.

11 Unless Your Honor has any more questions, I will  
12 take my seat.

13 THE COURT: That's fine. Thank you, Mr. Parker.

14 MR. PARKER: Thank you.

15 THE COURT: Ms. Miller?

16 MS. MILLER: Thank you, Your Honor. I thought it  
17 would go on the screen, but it would not. I have hard  
18 copies if Your Honor would allow me to disseminate them to  
19 the Court.

20 THE COURT: We will get it here.

21 MS. MILLER: It's the same thing that is in hard  
22 copies if the screens don't work.

23 THE COURT: All right. Go ahead.

24 MS. MILLER: Your Honor, as I said, I represent  
25 Indiana Packers and Mitsubishi Corporation, but for

1 purposes of this argument, I'm speaking on behalf of all  
2 nine defendants who filed individual motions to dismiss.  
3 Thank you, Your Honor.

4 Defendants recognize that we filed two  
5 comprehensive joint briefs that explain the myriad reasons  
6 that Mr. Neuwirth and Mr. Parker have already told you why  
7 these complaints should be dismissed in their entirety.  
8 The nine individual briefs, however, serve a very different  
9 purpose. They each show how plaintiffs have failed to meet  
10 their required burden of alleging sufficient facts linking  
11 each individual defendant to any conspiracy.

12 Plaintiffs concede at page 3 of their brief, as  
13 they must, that they must allege specific conduct by each  
14 individual defendant showing it joined and committed acts  
15 in furtherance of the conspiracy, but plaintiffs have  
16 failed to meet these elements with respect to each and  
17 every individual defendant.

18 Instead, their complaint rests on group pleading  
19 allegations that lump all of the defendants together. Each  
20 defendant, however, is uniquely situated. For example, the  
21 defendants are all different sizes, ranging from large  
22 publicly-traded firms with multiple plants, such as JBS and  
23 Tyson, to small single plant operators like IPC.

24 With respect to hog supplies, some defendants  
25 raise hogs themselves, so-called vertically integrated

1 suppliers. Others have contracts with hog producers.  
2 Others buy hogs on the open market, and some employ many of  
3 these different techniques.

4 With respect to sales of pork, each defendant  
5 produces a range of products with some specializing in  
6 commodity pork and value added brands. Indeed for many of  
7 these defendants there are only two or three factual  
8 paragraphs to purport to address their conduct. In short,  
9 Your Honor, it's important for each of these defendants  
10 that there are eight unique pork producing companies and  
11 each has submitted a brief for the Court's consideration  
12 and ruling.

13 Indeed, instead of showing facts that plausibly  
14 link each defendant to the alleged conspiracy, plaintiffs  
15 rely on large descriptions of the industry, but each  
16 defendant's individual motion explains why the allegations  
17 are insufficient as to each. We want to highlight briefly  
18 a few of the key arguments raised in these individual  
19 briefs, some of which put a finer point on certain  
20 arguments that were contained in the joint briefs, while  
21 others addressed arguments that are applicable only to  
22 certain defendants.

23 As a threshold matter, plaintiffs must show  
24 parallel conduct by individual defendants in order to infer  
25 that defendants actually agreed to reduce production, but

1 they fail to show any such coordinated cuts or other acts  
2 by these individual defendants. Indeed as we have already  
3 discussed somewhat this morning, the allegations in the  
4 complaint show the exact opposite.

5 The CACs cite to or rely on materials that  
6 document substantial capacity increases by numerous  
7 defendants. For example, the CACs concede that Clemens  
8 opened a brand new plant in Coldwater, Michigan, doubling  
9 its capacity and allowing it to process an additional 2.5  
10 million hogs annually.

11 Similarly, plaintiffs' only allegation of any  
12 substance directed at my client Indiana Packers refers to  
13 an article which says nothing about supply reduction.  
14 Indeed it says quite the opposite. It specifically states  
15 that IPC increased production by 20 percent and increased  
16 employment by 30 to 40 percent during the alleged  
17 conspiracy.

18 Amazingly, although plaintiffs reference and cite  
19 to this article and other documents in their complaint,  
20 they then tell the Court not to pay attention to them for  
21 purposes of this motion to dismiss, claiming now that they  
22 are mere mentions and therefore can be disregarded, but  
23 that is not the law.

24 And given that these articles for several of the  
25 defendants are the only things that purportedly link them

1 to the alleged conspiracy, we submit that the Court should  
2 reject plaintiffs' invitation to ignore them now.

3 Seaboard and Triumph opened a new processing  
4 plant through a joint venture, thereby substantially  
5 increasing capacity by six million hogs during the  
6 purported conspiracy. Of course, plaintiffs try to spin  
7 this and claim that the JV's delay in adding even more  
8 capacity through a second shift somehow supports their  
9 capacity restriction claims.

10 But the materials again that the plaintiffs  
11 specifically rely on reflect that it was a tight labor  
12 market that prevented adding another shift, not a desire to  
13 keep capacity from further expanding. Plaintiffs further  
14 allege that JBS USA acquired Cargill's pork related assets.  
15 Yet there is not a single allegation that JBS reduced  
16 supply after that acquisition.

17 Indeed, the CACs actually allege that the supply  
18 of pork has substantially increased during this purported  
19 conspiracy. In short, the Court need not accept the  
20 conclusions that are throughout plaintiffs' complaint that  
21 are inconsistent with the very facts that they rely on.

22 Unlike in *Broilers*, plaintiffs here fail to  
23 allege that "each defendant either cut production or took  
24 action to restrain production." This is a fatal flaw.  
25 Indeed, when you strip the improper group pleading, several

1 defendants, Clemens, IPC, Seaboard, Triumph, Tyson, are  
2 barely even mentioned in the complaint.

3 So instead, plaintiffs are left relying on  
4 allegations that simply do not form the basis of a  
5 plausible conspiracy. They use selective and out of  
6 context quotes from documents and earnings call  
7 transcripts. They make spurious claims about vertical  
8 integration, which we have already discussed this morning.  
9 They make allegations about participation and trade  
10 associations, but ones that have absolutely no link to any  
11 alleged conspiratorial conduct, and they simply say that  
12 all of these companies subscribed to Agri Stats.

13 But plaintiffs' reference or partial quotes from  
14 the articles and newspapers and earnings calls from these  
15 several defendants, we encourage the Court to look at them.  
16 We have submitted them to Your Honor because if you look at  
17 them for their actual content and for their relevant  
18 context, and each individual brief shows how the plaintiffs  
19 have selectively quoted from each of those documents and  
20 taken them out of context in order to fit their narrative,  
21 but as we have already established in each of these briefs,  
22 plaintiffs chose what to incorporate into their pleadings,  
23 and they cannot run from them now in order to survive  
24 dismissal.

25 As Mr. Neuwirth discussed at length plaintiffs'

1 reliance on the existence of vertical integration that  
2 certain defendants raise hogs in addition to processing  
3 hogs, I'm not going to rehash the conclusory allegations or  
4 the implausibility of those allegations, but it is  
5 important to recognize that plaintiffs' theory that  
6 defendants wanted to reduce hog production as part of a  
7 pork price fixing conspiracy is economically irrational  
8 because hogs are an input cost for pork producers, and as  
9 Mr. Neuwirth pointed out earlier, most of these defendants  
10 don't raise hogs.

11 For example as Hormel and Tyson both note in  
12 their individual briefs, it would be economically  
13 irrational for nonintegrated defendants such as Clemens,  
14 Hormel, ITC and Tyson to want to increase their costs.  
15 Smithfield gets roughly 10 million hogs per year, about  
16 half of their production, from independent growers.

17 Another point I want to make briefly, but first  
18 as was mentioned this morning, plaintiffs' allegations  
19 about reducing hog supply ignore that hog supply is a  
20 different marketplace with its own set of firms, tons of  
21 different numerous hog producers, not including many of the  
22 defendants, and therefore that's a separate conspiracy that  
23 they did not allege in this pork conspiracy that actually  
24 is in their complaints.

25 Second, mere trade association membership is not



1 enough to suggest a conspiracy. If so, firms in any number  
2 of different industries that have trade association  
3 meetings would simply stop having them. Plaintiffs make no  
4 effort to actually link the trade association meetings or  
5 activities to any operative event that supports their  
6 conspiracy claims, and as the individual briefs make clear,  
7 there are no allegations at attendance at meetings by  
8 specific defendants or allegations of any supply reductions  
9 following those meetings.

10 Finally, as we have talked about a lot today,  
11 each individual defendant cannot be pled into this lawsuit  
12 and dragged into, quite frankly, years of expensive  
13 litigation merely because of an Agri Stats subscription.  
14 Plaintiffs assert that belonging to Agri Stats is  
15 sufficient to establish each integrator defendant's  
16 participation in the conspiracy, especially at the pleading  
17 stage.

18 With all due respect, Your Honor, this is wishful  
19 thinking on the part of the plaintiffs. Benchmarking in  
20 and of itself, which is done in industries across the  
21 country, is in and of itself not anti-competitive. For the  
22 reasons we have already discussed this morning, plaintiffs  
23 have not alleged that Agri Stats was the basis for any  
24 agreement, and the per se price fixing conspiracy claim,  
25 which is the one that plaintiffs actually pled here,

1 requires more than just allegations about information  
2 sharing.

3 Indeed as Judge and now Justice Sotomayor made  
4 clear in *Todd v. Exxon* that a pure information exchange  
5 case is not a per se case, and that is not the complaint  
6 that plaintiffs have pled.

7 Finally, Your Honor, as we have talked about  
8 already, the need for these individual briefs in part stems  
9 from plaintiffs' heavy reliance on improper group pleading  
10 throughout the CACs. Each defendant felt the need to  
11 independently demonstrate that the generalized and  
12 conclusory allegations that collectively directed at, quote  
13 unquote, "defendants" did not apply to them.

14 Plaintiffs continue to assert, however, despite  
15 clear authority to the contrary from this very court that  
16 they can plead a conspiracy by resorting to made up  
17 definitions and group pleading. I won't reiterate or go  
18 through the additional corporate affiliation arguments  
19 which have already been made because the Court is very  
20 familiar with those authorities, and quite frankly the law  
21 is clear on this point.

22 In sum, although plaintiffs' complaints and their  
23 briefing on these motions contain a lot of words and a lot  
24 of industry allegations, they actually say very little.  
25 Having failed to carry their burden to allege actual facts

1 and not mere conclusions to support their claims against  
2 each individual defendant, their claims should be dismissed  
3 as to each defendant, and each of the individual  
4 defendants' brief ask the Court to do just that.

5 Whatever time we have left, Your Honor, we would  
6 like to reserve for rebuttal.

7 THE COURT: Thank you, Ms. Miller.

8 MS. MILLER: Thank you.

9 THE COURT: Let's take about a five-minute break.

10 THE CLERK: All rise.

11 **(Recess taken.)**

12  
13 **(In open court.)**

14 THE COURT: All right. You may be seated. Go  
15 ahead.

16 MS. SCARLETT: Your Honor, Shana Scarlett for the  
17 Consumer Indirect Purchaser Plaintiffs. I will be  
18 addressing the *Twombly* issues, and my colleague  
19 Mr. Bruckner will be addressing statute of limitations and  
20 the individual defendant motions.

21 THE COURT: All right.

22 MS. SCARLETT: *Twombly* requires only the  
23 plausibility of a conspiracy, and plaintiffs have done that  
24 here. The agreement alleged is one to constrain supply and  
25 stabilize the price of pork. Not hogs, of pork.

1           Agri Stats was an information exchange, and it's  
2           an example of a facilitating practice that can help support  
3           the inference of a price fixing agreement. That's  
4           consistent with the Court's instruction in *Todd*, and it's  
5           certainly consistent with the Supreme Court's decision in  
6           *Linseed Oil* where it said, Furnishing sensitive business  
7           information to competitors takes away freedom of action by  
8           revealing intimate details of affairs to competitors, and  
9           that was what happened here.

10           Agri Stats reduced the strategic uncertainty in  
11           the marketplace by providing competitors with some of the  
12           most sensitive production and supply information about  
13           their competitors.

14           THE COURT: Do you know, is there a significant  
15           difference between what is available publicly and what was  
16           shared through Agri Stats?

17           MS. SCARLETT: Your Honor, I'm a little bit  
18           constrained. I am one of the counselors in the *Broiler*  
19           case, and I do know a lot of information about Agri Stats  
20           reports there that I am constrained from talking about  
21           here.

22           THE COURT: Right.

23           MS. SCARLETT: But I will say this: There is no  
24           public Agri Stats report that we could find to put into  
25           this complaint to demonstrate to Your Honor the detail that

1 is passed between competitors. The public information that  
2 we cite on production is from the USDA, and as you see from  
3 the defendants' briefs, they attack it for being aggregated  
4 and for masking individual differences. I have to believe  
5 they made this argument a little bit tongue in cheek  
6 knowing of course only aggregate data is available  
7 publicly, and what they have available through Agri Stats  
8 is so much more detailed.

9 So when Agri Stats saw the success that it had in  
10 the broilers industry using its reports and sharing  
11 information between competitors, it issued its invitation  
12 to the pork producers. There is overlap in ownership  
13 between broilers and pork companies, and so some of the  
14 defendants, for example Tyson, knew the success it had in  
15 the broilers industry using these Agri Stats reports.

16 In 2008 when Agri Stats made this offer, it  
17 encouraged each and every commercial swine operation to  
18 participate in this benchmarking operation, and the pork  
19 producers, they took up that offer. We see in 2009  
20 statements starting to be made by Smithfield about its  
21 reduction of 50,000 sow in 2008. We saw Hormel talking  
22 about a contraction in supply.

23 We see Smithfield talking about its 3 percent cut  
24 on top of the 10 percent that it already made, and it says  
25 to the market openly, Somebody else has got to do

1 something. In September 2009, Smithfield CEO states  
2 publicly that he had had conversations with large  
3 producers, some of whom were doing liquidation. He says  
4 again to the industry, The industry has got to solve it  
5 collectively. There are others cutting back. We're not  
6 the only ones.

7 Smithfield says also publicly, and we believe  
8 that the CEO must have been referencing Agri Stats. The  
9 only other possible interpretation is that he had had  
10 private conversations, but in paragraph 103 of the consumer  
11 complaint, we quote him as saying, We think we know  
12 privately how many they kill, what their processing levels  
13 are and things like this. This is information you might  
14 not have.

15 And he is saying this is information you might  
16 not have to the public, to investors, to financial  
17 analysts. All right? He is admitting that the information  
18 they have through other means on production and supply is  
19 something the public doesn't have.

20 Defendants have spent a lot of time talking about  
21 that there is production increases during the class period.  
22 Of course, there were three absolute decreases that the  
23 complaint alleges in 2009, 2010, and 2013. These decreases  
24 in supply occurred after decreases in pork prices, making  
25 for the type of abnormal pricing that courts look to when

1 looking to see the plausibility of a conspiracy.

2 Plaintiffs' theory is that the supply reduction  
3 was over historical levels. It's not an absolute  
4 reduction. We've had a couple charts that we have looked  
5 at where there has been lines drawn through. Defendants  
6 once again criticize the plaintiffs' chart for only hitting  
7 two pre-conspiracy lines and not fitting more tightly.

8 I would just like to hand up another version of  
9 the chart where we took their criticism to heart and tried  
10 to address it and added a third line. This line is in  
11 yellow which skews more tightly to pre-conspiracy but still  
12 shows an underproduction compared to historical levels.

13 But I think the one thing that this multitude of  
14 charts now really drives home, and it is where the *Broilers*  
15 court landed, which is this is a question of fact. This is  
16 inappropriate for resolution at the motion to dismiss  
17 stage.

18 Production numbers and the types of multi variate  
19 regression analyses undertaken by economists, by economists  
20 at the Rule 26 stage, are very factually intensive, and  
21 this type of decision on whether or not production was  
22 oversupply or undersupply is not appropriate for the  
23 motions stage.

24 The other type of thing that courts look to when  
25 looking at the plausibility of a conspiracy is pricing, and

1 here all of the complaints speak to the abnormal pricing  
2 that took place. The average pork wholesale price, the  
3 price at which pork was sold downstream, was at or below  
4 \$50 every year between 1998 and 2009. 2009 it increased to  
5 \$76.30, and it remains elevated. The plaintiffs didn't  
6 stop at just looking at one type of pricing, however. We  
7 also looked at the pork cutout competent price also  
8 published by the USDA. It showed the same increase. So  
9 looking at pricing in multiple ways, we see a break between  
10 what happened pre-class period and what happened during the  
11 class period.

12 Defendants in their briefs and today have argued  
13 several counter factual explanations that they think  
14 explain away the pricing and the production numbers. They  
15 point to the great recession. They point to hog disease,  
16 and they point to raising corn prices.

17 Again, at the pleading stage, it's inappropriate  
18 to consider this type of counter factual suggestion, and it  
19 also is a question of fact that the economists look at in  
20 multi variate regression analyses to control for these type  
21 of complicated factors, but even then, the great recession  
22 and the hog disease are two limited periods of time.

23 They are two very discrete events that happened  
24 that can't possibly explain the entire class period and the  
25 trends that are seen, and for corn prices, which would



1 underlie, if you look at paragraphs 128 and 129 of the  
2 consumer complaint, we looked at the profit margin of the  
3 producers. So we took into account their costs and  
4 compared that against prices.

5 And the rising costs did not explain the increase  
6 in prices, and this is a statistically different --  
7 statistically significant different result than the  
8 pre-class period because input costs did explain prices to  
9 a large extent in the pre-class period. We did more than  
10 just look at general industry data.

11 Two publicly-traded defendants, Tyson and  
12 Smithfield, had sufficient information in their financial  
13 reports that we also looked at those more individually, and  
14 we came up with the same conclusion, paragraphs 131 and 132  
15 of the consumer complaint. Rising costs such as corn did  
16 not explain the abnormal pricing in this industry.

17 Just a couple other things briefly. Market  
18 concentration here makes this somewhat different than the  
19 broiler industry but in a way that makes the conspiracy  
20 more plausible. Here we have 8 defendants controlling 80  
21 percent of the market. In *Broilers*, there is somewhere  
22 around 18 defendants in that case with a couple more  
23 producers that are named as coconspirators, but that's a  
24 significant difference.

25 And addressing the defendants' point on vertical

1 integration, there are a number of vertically integrated  
2 defendants, but the conspiracy is not predicated on  
3 vertical integration. It is one of the pieces of market  
4 structure which makes the existence of a conspiracy more  
5 likely. It has fewer firms that compete at all levels, and  
6 it's easier to collude on price when you have a reduced  
7 market like this.

8 The plaintiffs allege that the pork producers  
9 control the hog farmers that are growing the hogs.  
10 Paragraphs 109 and 114 of the consumer complaint discuss  
11 how the integrators retain ownership of the hogs, they pay  
12 service fees to the farmers who bear the investment costs  
13 and the pork packers have control of the production numbers  
14 through contractual relationships.

15 And just stepping back for a moment in utilizing  
16 the common sense that defendants just evoked so frequently  
17 in the last hour, it only makes common sense that companies  
18 as large as JBS, Tyson, Smithfield exert power and control  
19 over the individual hog farmers that do exist that are  
20 raising those hogs. It makes no sense the other way  
21 around.

22 THE COURT: Did the plaintiffs change their  
23 theory about Agri Stats between the complaint and the  
24 response? Maybe you can talk about that for a moment, from  
25 enforcement to exchange of information.

1 MS. SCARLETT: Absolutely not, Your Honor. There  
2 was no change in the theory of the complaint. I think the  
3 confusion arises from the fact that Agri Stats permeates  
4 almost every part of this conspiracy in the type of web  
5 that is so rarely seen in other areas. I, and many of my  
6 co-counsel, have done a lot of conspiracy cases. We have  
7 seen a lot of trade associations that have information  
8 provided.

9 I think it's fair to say none of us have ever  
10 seen detail of the level provided in Agri Stats. So, yes,  
11 this information exchange under *Todd* is seen as one way to  
12 facilitate a price fixing conspiracy. That was always the  
13 theory as pled in the complaint, but it is also an  
14 enforcement mechanism.

15 Once you're five years into a conspiracy and  
16 you're able to see the production trend lines, Agri Stats  
17 absolutely is allowing the competitors to see whether  
18 someone has stepped out of line, has someone increased its  
19 market share, and there are the market share -- we have in  
20 the complaint market share analyses that look at the  
21 defendants' market share over the class period and how  
22 stable it remained.

23 And not only do we have the graph in the  
24 complaint, which shows just by looking at the stability of  
25 these market shares, we also see that we did a standard

1 deviation analysis just to show that market shares were  
2 more stable during the class period than before, and part  
3 of this reason is Agri Stats.

4 There is no better way to enforce a conspiracy  
5 than to receive the data weekly and monthly in your  
6 offices. Unlike other cartels, it's not necessary to go to  
7 a room to exchange paper, to exchange the production  
8 numbers, to have a Power Point up on the wall where  
9 executives look at what is coming. There is no need for  
10 that in this technical world where Agri Stats provided it  
11 to the defendants weekly and monthly.

12 If Your Honor doesn't have any more questions, I  
13 think I will turn it over to my colleague, Mr. Bruckner.

14 THE COURT: Just one issue.

15 MS. SCARLETT: Sure.

16 THE COURT: Maybe Mr. Bruckner can address it,  
17 too. The issue of the parent companies engaging in  
18 anti-competitive activities, is that something you're going  
19 to take?

20 MS. SCARLETT: Mr. Bruckner is going to.

21 THE COURT: All right. Thank you, Ms. Scarlett.

22 MR. BRUCKNER: Thank you, Your Honor. First on  
23 the statute of limitations issues, let me cut to the heart  
24 of the defendants' arguments since I know we're running  
25 short on time. Mr. Parker talked about the information

1 that was publicly available back in the day or back during  
2 the limitations period, but by no means does that  
3 constitute the basis of our claim.

4 In any event, no court has ever held that the  
5 purchasers of a product are under a duty of reasonable care  
6 to monitor earnings calls or other information that is  
7 provided for the benefit of investors, but more to the  
8 point, as the Eighth Circuit pointed out in the *Great*  
9 *Rivers* case, Public information is not automatically  
10 imputed to an injured party without a determination of some  
11 storm clouds on the horizon.

12 So this is, there is three elements of fraudulent  
13 concealment, as Your Honor knows, and what we're really  
14 talking about here is, were the plaintiffs, did they  
15 exercise due diligence, so let's talk about that. What  
16 were the storm clouds? What were the storm warnings that  
17 put plaintiffs on notice and brought us and led us to bring  
18 the claims that we brought here today?

19 It wasn't the defendants' public statements in  
20 their earnings calls, especially not when you couple them  
21 with their pretextual explanations for increases in pork  
22 products, increases in their own profits. They blame those  
23 on China. More grain was going to China. They ascribe  
24 their improved profits to better programs with dealers and  
25 the like.

1           They were throwing us off the scent. They were  
2           affirmatively throwing us off the scent. Given the time, I  
3           don't want to spend a lot of time on their affirmative  
4           acts, but we have covered those in our papers in addition  
5           to the fact that we allege a self-concealing conspiracy, a  
6           standard which is accepted and which Judge Alsop affirmed  
7           in the *United Power* case. He said, Alleging a  
8           self-concealing conspiracy is an alternative to alleging  
9           affirmative facts, but we have done both.

10           Let me get back to the storm clouds. What put us  
11           on notice? It wasn't their public statements. It wasn't  
12           the fact that a benchmarking service became available in  
13           the pork industry. What put us on notice and what  
14           constituted a storm cloud was the real story behind this  
15           so-called benchmarking service.

16           Through Agri Stats, the defendants, who are  
17           ostensible competitors, exchanged extremely confidential  
18           and extremely sensitive information, detailed bottom line  
19           information, with each other on a regular basis. There was  
20           profit information, prices, costs, production. It was  
21           current and forward-looking information, which courts  
22           consistently hold has the greatest potential for  
23           anti-competitive effects.

24           That information was not aggregated as  
25           benchmarking services often are. It was specific to

1 specific producers. Now, nominally it was anonymous data,  
2 but each of the defendants was able easily to de-anonymize  
3 that data and identify their competitors' data in Agri  
4 Stats reports, and as importantly, they knew that each of  
5 their competitors could do the same thing, that is  
6 de-anonymize their own data.

7 The defendants paid millions of dollars over the  
8 class period for these Agri Stats reports, much, much more  
9 than they paid for any other information that they got  
10 through various indices. And, Your Honor, if the  
11 defendants suggested today that all of those facts were  
12 publicly available, that's just not so. Those facts were  
13 all secret, confidential. None of that was publicly  
14 available.

15 Agri Stats itself as we allege in our complaint  
16 in the direct purchaser complaint, it's paragraph 144, Agri  
17 Stats itself bragged that it was a confidential company.  
18 Agri Stats has always been kind of a quiet company. There  
19 is not a lot of people that know a lot about us, obviously  
20 due to confidentiality that we try to protect. We don't  
21 talk about what we do. That's absolutely true. They did  
22 not talk about what they did, and the defendants sure  
23 didn't talk about what they did.

24 We also learned in February -- in 2018 that the  
25 Department of Justice had issued a civil investigative

1 demand to Agri Stats which specifically referenced the pork  
2 industry. We also had the Bloomberg article in February of  
3 2017 which said in essence that the aspect of the broiler  
4 conspiracy that Agri Stats was a key part of had been  
5 imported into the pork industry. That's --

6 THE COURT: Mr. Bruckner, does the fact that  
7 public statements were made early on as alleged in the  
8 complaint impact the self-concealing conspiracy claim?

9 MR. BRUCKNER: Your Honor, I don't believe that  
10 it does, especially given our position that we don't think  
11 those public statements by themselves excited inquiry  
12 notice. So -- and especially if you balance them with the  
13 pretextual explanations that they were giving at the same  
14 time, we believe that if anyone had seen those public  
15 statements alone in isolation, which I don't need to remind  
16 the Court is not how you approach or address plaintiffs'  
17 allegations on a motion to dismiss, but if you look at  
18 those public statements, you look at at the same time with  
19 the other hand the defendants are explaining them away with  
20 seemingly innocuous explanations, no, I don't think it has  
21 an impact on the self-concealing aspect that we have  
22 alleged.

23 Very briefly, Your Honor, continuing violation?  
24 We believe we have alleged fraudulent concealment  
25 sufficiently, but even if the Court is of another belief,



1 we have alleged a continuing violation. I don't want to go  
2 through in great detail given the shortness of time, but  
3 *Propane I*, the first *Propane* decision by the Eighth  
4 Circuit, the en banc one, is quite clear that each sale to  
5 a plaintiff in a price fixing conspiracy starts the  
6 statutory period running again. Courts consistently have  
7 held that. The en banc court in *Propane I* noted that every  
8 circuit that has addressed that issue finds that in a price  
9 fixing conspiracy, which this is, each subsequent sale  
10 starts the statutory period running again.

11 Judge Montgomery found that in the *Wholesale*  
12 *Grocers* case, and every other case has found the same  
13 thing.

14 THE COURT: The continued violation theory  
15 depends heavily on the existence of Agri Stats, correct?

16 MR. BRUCKNER: It depends in part on the  
17 existence of Agri Stats and the information that they  
18 exchanged.

19 THE COURT: There were no public statements made  
20 after 2013 or somewhere around there.

21 MR. BRUCKNER: That's true.

22 THE COURT: And production did start to steadily  
23 increase at that point in time, so what else besides Agri  
24 Stats supports the continuing violation theory?

25 MR. BRUCKNER: Well, number one, the fact that we

1       allege that the conspiracy continued, none of the factors  
2       that constituted the conspiracy, that is an agreement to  
3       limit supply, and by the way, the fact that there were no  
4       affirmative or absolute cuts is not contrary to our theory.  
5       Our theory is that this conspiracy led them to restrain  
6       supply and not increase it at the rate it otherwise would  
7       have been. We allege that that continued throughout the  
8       period up until today.

9               All of the hallmarks of this industry that  
10       facilitate collusion and make collusion more likely,  
11       increasing concentration, high barriers to entry, none of  
12       that stopped. We certainly have not alleged that any of  
13       that stopped. So we say that all of the key factors that  
14       we allege form this, not only form the conspiracy but  
15       facilitated the conspiracy, continued throughout the  
16       period.

17              And finally, Your Honor, I would, I would note  
18       that all of these issues on the statute of limitations, be  
19       it fraudulent concealment or continuing violation, are  
20       uniquely fact based determinations that in order to resolve  
21       them on a Rule 12 motion, the Court essentially would have  
22       to do what the defendants are inviting it to do, and that  
23       is look only at the allegations they like, like public  
24       statements, ignore the allegations they don't like, like  
25       our explicit allegation of affirmative facts, the

1 self-concealing nature of their conspiracy and all the  
2 storm warnings that we talked about just a moment ago.

3 Unless the Court has more questions on that, I  
4 want to turn very briefly to the individual motions, and  
5 let me start with the point that Your Honor raised on the  
6 parent companies because I think those are different than  
7 the operating companies, I'll call them. Your Honor, our  
8 position is that by our definition, the defendants, we have  
9 alleged that each one of them participated in the conduct  
10 at issue.

11 We allege more than simply that the parent acted  
12 as a parent company to each one's subsidiary, and frankly,  
13 Your Honor, we think that the depth and the extent of that  
14 control is as a matter of fact that ought to be explored on  
15 discovery, but if the Court is of a different mind and is  
16 not persuaded, we say that any dismissal of those parent  
17 companies ought to be without prejudice so that we can  
18 specifically pursue that question of the scope and extent  
19 of control in discovery, and if appropriate we will  
20 re-plead those allegations with more specificity.

21 But let me go back to the overall -- let me go  
22 back to the rest of the individual motions to dismiss, and  
23 I want to talk about a couple of overall legal principles  
24 that apply here. Number one, it's quite clear and  
25 well-established that Rule 8(a) does not require us to

1 plead specific facts.

2 We only need to plead -- the statement need only  
3 give the defendant a fair notice of what the claim is and  
4 the grounds upon which it rests. That's what the Supreme  
5 Court held in *Erickson v. Pardus*, the same term that it  
6 came out with the *Twombly* decision, and there is Eighth  
7 Circuit Minnesota precedent to support that as well.

8 We need not allege defendant-by-defendant  
9 allegations. Judge Magnuson so held in the *Bulk Popcorn*  
10 case, and Judge Illston has so held in the *LCD* case. We  
11 also are not required to allege participation by each and  
12 every conspirator in each and every detail of the  
13 conspiracy.

14 What we do allege, let me give just a summary of  
15 allegations that are applicable to each and every one of  
16 the eight producer defendants, not Agri Stats, but each and  
17 every one of the eight producer defendants. We allege that  
18 each defendant, and we identify each one by name, entered  
19 into a conspiracy to fix, raise, maintain and stabilize the  
20 price of pork.

21 We allege that the principal method, not the  
22 exclusive method but the principal method, by which each  
23 defendant implemented it, each defendant identified by  
24 name, was by coordinating their output and restricting  
25 their production. We allege that each defendant identified

1 by name exchanged this highly confidential and extremely  
2 sensitive information with each other through Agri Stats.

3 I don't want to go back through the Agri Stats  
4 litany, but it is important to note that we allege that  
5 each defendant identified by name engaged in that behavior.  
6 We allege that each defendant was able to identify their  
7 conspirators' information and that each defendant knew that  
8 their competitors were able to do the same thing.

9 And each of those allegations, as I say, are  
10 defendant specific. We go down the list, Clemens, Tyson,  
11 all of the rest, and it applies to each of them. We think  
12 that's sufficient to keep defendants in the case, deny  
13 their motions to dismiss.

14 Given the fact that we are now out of time,  
15 unless the Court has more questions, I will step down.

16 THE COURT: I think that's fine. Rebuttal here,  
17 a little? How about, can we do it in ten minutes time for  
18 each of you?

19 Okay. Go ahead.

20 MR. NEUWIRTH: Thank you. Your Honor, litigation  
21 is not supposed to be by slight of hand, and Your Honor  
22 focused on Agri Stats in some of your questions, and we  
23 submit that Agri Stats shows why this case must be  
24 dismissed. It is not legitimately disputable that what is  
25 alleged in the complaint, and we showed you the paragraphs,

1 is that Agri Stats was an enforcement mechanism, and if  
2 there is any doubt about what was alleged, the proof is in  
3 the putting of the *broilers* decision itself.

4 In the *Broiler* case on which this case was  
5 modeled, the District Court expressly noted at page 800 in  
6 its opinion, "Here Agri Stats is not the mechanism  
7 defendants are alleged to have used to effectuate the price  
8 increases. That would be the means of their production  
9 cuts. Rather, plaintiffs allege defendants used Agri Stats  
10 as a means of communication and monitoring."

11 And that's what was alleged here originally.  
12 Now, the problem with that theory in this case is that  
13 unlike in the *Broiler* case where the District Court felt  
14 the complaint showed in great detail what the defendants  
15 specifically did with the information from Agri Stats to  
16 affect supply and all the unprecedented conduct with  
17 specificity that the particular defendants alleged or  
18 alleged to have participated in there, none of that is  
19 here, and you didn't hear any of that in the argument  
20 today.

21 You heard no specific allegations of what the  
22 defendants supposedly did to cut supply. What you heard  
23 was an allegation that is the shifted position that's not  
24 in the complaint that exchanging information through Agri  
25 Stats was the conspiratorial conduct and that this

1 supposedly had all these effects, none of which are alleged  
2 in the complaint, and it is remarkable that my friend  
3 Mr. Bruckner stood here and said that the *Bulk Popcorn* case  
4 shows that their allegations are sufficient.

5 The *Bulk Popcorn* case is the 1991 case that used  
6 the slight evidence rule, which we showed you has been  
7 rejected by the Eighth Circuit and that the district courts  
8 say is not good law in civil antitrust cases. The slight  
9 evidence rule is a rule that would say that absolute  
10 absence of fact details about the particular defendants are  
11 okay, and just listing the names of the defendants side by  
12 side with conclusory allegations proves absolutely nothing.

13 Agri Stats is an exchange of information. That's  
14 their new theory, but the *Todd v. Exxon* case on which they  
15 rely says the mere exchange of information is not enough.  
16 Now, Your Honor asked the very legitimate question of,  
17 well, is this secret information or public information.

18 However, whatever information it was, there is no  
19 allegation that something was done with it to actually  
20 affect supply, that any of the defendants did particular  
21 things to reduce supply. This is a case about the supply  
22 of hogs. We showed you in the complaint where it says it.  
23 We showed that the complaint says that through cutting hog  
24 supply the defendants were able to get their desired effect  
25 of raising the price of pork.

1           It is a total misrepresentation of the complaint  
2           for the plaintiffs to stand up here now and tell Your Honor  
3           that this is not a case about reducing the supply of hogs,  
4           and the problem is, even if all this information was  
5           exchanged through Agri Stats exactly as the plaintiffs want  
6           to describe it, they can't overcome the problem that we are  
7           talking here about the supply of hogs.

8           And they have no answer to the fact that just  
9           three of the pork producer defendants out of eight are  
10          alleged to have any hog supply of their own, and it was an  
11          overt misleading statement here to say to Your Honor that  
12          the Smithfield CEO had talked about, with pork producers,  
13          about destruction of pork.

14          Who are those producers? The term "producers"  
15          refers to the very independent pork, hog producers that are  
16          referenced in the complaint. We showed you earlier that  
17          the complaint talks about them, and it is just a slight of  
18          hand to come up here now and try to recharacterize the  
19          complaint as something different from what it really is.

20          There is no way that they can solve the problems  
21          in the complaint by invoking Agri Stats, and as we showed  
22          you repeatedly and as we show in our briefs, when the Agri  
23          Stats information was exchanged, supply kept going up at  
24          the same rate.

25          Now, this chart which we were handed during the



1 argument, we will put aside the fact that this was not in  
2 any of the papers. It's something brand-new today. This  
3 yellow line is something brand-new, but look again what  
4 they have done. They have left out a chunk of the period  
5 where there were dots that they want to exclude.

6 This is not the way the *broilers* court draws its  
7 chart. We showed you what the *broilers* court did, and this  
8 yellow line relies on a point in the conspiracy, the  
9 alleged conspiracy, to purportedly show the trend line  
10 pre-conspiracy. The much better line is the one that we  
11 showed you, which runs through the dots in the  
12 pre-conspiracy period and the post conspiracy period. We  
13 showed you what the *broilers* court did.

14 I would respectfully ask Your Honor to turn to  
15 tab 35 in the book that I gave you originally. We heard in  
16 the plaintiffs' argument that supposedly profit margins or  
17 abnormal pricing show that this conspiracy was effective.  
18 Now putting aside that there is no relationship whatsoever  
19 in the complaint alleged between any conduct and what  
20 happened with the prices, if you look at the chart that we  
21 show on tab 35, which comes from their complaint, it shows  
22 that the only time prices went up in a way that was  
23 different from what is the obvious trend before and during  
24 the conspiracy was during years when we know from the  
25 allegations of the complaint that there was a recession,

1 swine flu and the PED virus.

2 And it's remarkable. There was no answer to what  
3 we showed Your Honor. The complaint does not say that this  
4 was a period when supply was going down. It points to  
5 three years, 2009, 2010, and 2014, where the complaint says  
6 supply went down. It is just a misrepresentation of the  
7 complaint to come now and tell Your Honor otherwise.

8 And the complaint itself contains the obvious  
9 explanations for why supply went down in those years, and  
10 we showed you, particularly, that the complaint says in  
11 2014 the PED virus affected supplies, but the documents  
12 underlying that show that that started in 2013.

13 So we are left with nothing, nothing that makes  
14 this complaint plausible. All of the general statements  
15 that were made here today in the plaintiffs' argument are  
16 trying to put a gloss over, to distract from what are the  
17 detailed failures of the complaint to allege something  
18 plausible.

19 Agri Stats shows what's wrong with the complaint.  
20 It is not a reason to deny the motion to dismiss because  
21 there is no way they can link the exchange of information  
22 in Agri Stats to any ability or desire of these defendants  
23 to reduce the supply of hogs as a way to raise prices.

24 The only thing they point to in their complaint  
25 have obvious explanations that they themselves put in, and

1 in both our hearing binder and our briefs we speak in  
2 detail about the public statements that they cite, but the  
3 Smithfield CEO statement is perhaps the most glaring one in  
4 terms of the abuse that the plaintiffs are making of what  
5 these public statements said. The Smithfield CEO said in  
6 2009 that he had been in communication with producers of  
7 hogs.

8 Those are not the defendants, and later that year  
9 as we point out in our papers, the Smithfield CEO said that  
10 supply had in fact gone up. This is the opposite of what  
11 happened in the *Broiler* opinion. We believe if one puts  
12 the *Broiler* opinion side by side with the allegations in  
13 this complaint, there is no way that the plaintiffs can  
14 legitimately defend it.

15 Thank you very much, Your Honor. Mr. Parker had  
16 a couple points to make on statute of limitations.

17 THE COURT: Let's make it quick. We have run out  
18 of our ten minutes here.

19 MR. PARKER: Thank you very much. We are not  
20 suggesting that the plaintiffs here have to monitor  
21 earnings calls. What I am suggesting is is that when there  
22 is marketplace activities, pricing and production activity  
23 that they know about that they describe as dramatic and  
24 drastic and abnormal, they are put on notice.

25 Once you're on notice and you do your due

1 diligence, you would have found the earnings call. That's  
2 what I'm saying. Maplevale is a big buyer. They're a  
3 broad line wholesale company. They are buying pork every  
4 day. They know what is happening in the marketplace.  
5 There is nothing unfair with saying that they're on notice  
6 when the pricing becomes abnormal.

7 Second, the pretextual statements, I would refer  
8 the Court to the *Wholesale Grocers* case and to the *Milk*  
9 case which said that pretextual statements, when objective  
10 reality, what those cases say, when objective reality, i.e.  
11 pricing, shows there may be something to be interested in,  
12 pretextual statements do not constitute hiding, do not  
13 constitute concealment.

14 The third point -- and again, there is nothing  
15 that we concealed. They haven't, they haven't told us what  
16 we concealed, but the third point I want to make is  
17 something that they raise, and it's not in the, it's not in  
18 the record, but I don't want you to think that somebody got  
19 in trouble here.

20 Yes. The DOJ did investigate during the time  
21 period when they should have been doing their due  
22 diligence. Something excited their interest, and guess  
23 what? They shut it down. They looked at Agri Stats. They  
24 subpoenaed documents. They shut it down. That's what I  
25 had to say because I don't want you to think that there was

1 some DOJ thing out here.

2 The reality is -- and it makes the point I'm  
3 making. Something excited their interest, and they shut it  
4 down. They didn't find anything wrong.

5 Thank you.

6 THE COURT: All right. Thank you, Mr. Parker.

7 MS. MILLER: Two very quick points, Your Honor,  
8 which I will try to make not too quick for the court  
9 reporter. On the corporate defendants, Your Honor, if you  
10 look at slide 6 in the presentation, in their brief, and  
11 Mr. Bruckner made the point again today, they are defining  
12 the two JBS entities similarly as defendants, and that  
13 under the plaintiffs' theory brings them in.

14 They define Mitsubishi Corporation as Indiana  
15 Packers, and on that theory that brings them in. They do  
16 it with respect to the Seaboard, Triumph, a number of these  
17 defendants, but as Your Honor held in the *Hudock versus LG*  
18 *Electronics* case, that is not enough where Your Honor  
19 dismissed two Best Buy entities when those plaintiffs tried  
20 to do the exact same thing.

21 With respect to the specific individual specific  
22 pleading that Mr. Bruckner stood up there and said that  
23 they have made specific allegations as to each and every  
24 individual defendant, I respectfully disagree. Yes, they  
25 did say in their complaints that each defendant, they list

1 out the names of them, participated in the conspiracy, but  
2 they don't say what that conspiracy was or what each of  
3 those defendants did to participate in that conspiracy.

4 He said the principal method of effecting the  
5 conspiracy was restricting supply. We have talked about  
6 supply ad nauseam this morning. It's clear that a number  
7 of these defendants don't control supply at all so had no  
8 ability to increase it, decrease it or do anything as to  
9 it.

10 Those that did, supply increased. That each  
11 defendant subscribed to Agri Stats, we have covered that.  
12 Benchmarking in and of itself is not anti-competitive, and  
13 each defendant could identify the other in Agri Stats, we  
14 have plaintiffs' one or two paragraphs in the complaint  
15 that say that. Saying it doesn't make it a reality.

16 Thank you, Your Honor.

17 THE COURT: All right. Thank you. Go ahead.  
18 One comment.

19 MS. SCARLETT: One comment. There has now been  
20 repeated discussion that somehow the plaintiffs have misled  
21 the Court and wildly changed their theory from the original  
22 complaint and the briefing. Your Honor has all of the  
23 papers, and the plaintiffs have absolutely done none of  
24 those things.

25 Thank you for your time.

1 THE COURT: All right. Thank you for the  
2 arguments this morning, Counsel. The Court will take the  
3 motions under advisement and will issue a written order as  
4 quickly as possible. Thank you.

5 We will be in recess.

6 THE CLERK: All rise.

7 **(Court was adjourned.)**

8 \* \* \*

9 I, Kristine Mousseau, certify that the foregoing  
10 is a correct transcript from the record of proceedings in  
11 the above-entitled matter.

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15 Certified by: s/ Kristine Mousseau, CRR-RPR  
16 Kristine Mousseau, CRR-RPR  
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